Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

No. A-669

77-1272

ALFRED VINER,
Petitioner,

v.

THE UNITED STATES

Petition for Writ of Certiorari to the Third Circuit Court of Appeals for Review of the Judgment Order of January 11, 1978 affirming Judgment of Conviction and Sentence entered May 19, 1977, Eastern District, Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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DISCUSSION OF OPINION IN THE COURTS BELOW

Essentially the defendant Alfred Viner raised identical contentions of error in his post-trial motions at the District Court level as well as in his appeal to the 3rd Circuit Court of Appeals. Although there are four (4) different points raised, each assigned error ultimately related to a single most prominent fatal defect in the prosecutor's case. That particular defect consisted of the failure on the part of the Government to produce sufficient independent proof aliunde of the existence of a conspiracy between the defendant and his co-defendant for purposes of distributing controlled substances such as to warrant the wholesale introduction into evidence of hearsay declarations of the defen-

dant revealed to authorities by the co-defendant and testified to by Federal Drug Enforcement Agents.

The contention that the extremely inculpatory statements purported to have been made by the defendant were inadmissible by reason of the failure to independently prove a conspiracy constituted the fourth and last error assigned in the lower Court. The first defect raised in the 3rd Circuit Court of Appeals was the insufficiency of the evidence against the defendant to sustain a conviction. Yet, the evidence is insufficient since, stripped of the unfounded hearsay and double hearsay, the prosecutor had no substantive proof of the defendant's guilt.

The second assigned error arose

from prejudicial remarks made by the prosecutor; yet, those remarks were the prosecutor's expression of his opinion that the Petitioner, Alfred Viner, was indeed a member of the conspiracy, a fact completely unsupported by the evidence except for inadmissible hearsay declarations revealed to supra. The third error raised in the lower Court was based upon the Trial Court's improperly charging the Jury on law applicable to aiding and abetting and conspiracy. Again, the error relates directly to the fourth and final contention by the Petitioner that hearsay declarations were introduced against him without proof of his membership in a conspiracy involving the purported hearsay declarants. Specifically, the Petitioner alleges that the

conduct of the defendant as related by trial witnesses was consistent only with either innocence or guilt of the substantive offense by reason of membership in a conspiracy. The Court erroneously charged the Jury that it might found the defendant's guilt on the theory of aiding and abetting because the District Court had erroneously admitted the hearsay declarations which were the sole evidence of aiding and abetting.

The judgment order without opinion in the 3rd Circuit Court of Appeals appears infra. pg. and the order of the Trial Court denying the post-trial motions may be found in the appendix to the 3rd Circuit Court of Appeals brief of the appellant at page 211a. Both such judgment orders

merely recite the four assigned errors and deny the relief requested with no argument, no discussion, and no citation of authority.

JURISDICTIONAL STATEMENT

Petitioner seeks review by this Court of the judgment order of the Third Circuit Court of Appeals dated January 11, 1978 (reproduced infra. at page) affirming the judgment of conviction and sentence imposed on the defendant in the United States District Court for the Eastern District of Pennsylvania on May 19, 1977. The initial judgment of conviction arose from a two count indictment (Criminal No. 76-554-2 in the Eastern District of Pennsylvania) charging the defendant with violations of Federal Criminal Statutes proscribing distribution of a controlled substance [21 U.S.C.A. § 841 (a)(1)] and Conspiracy to distribute a controlled substance [21 U.S.C.A. §846].

After denial of post-trial motions by the Court without opinion judgment of conviction and sentence was entered May 19, 1977 before the Honorable Joseph L. McGlynn, Jr., in the Eastern District of Pennsylvania. Thereafter timely appeal was filed in the Circuit Court of Appeals from the 3rd Circuit and docketed at No. 77-1738 (certified copies of 3rd Circuit Docket Entries have been filed with the Court contemporaneously with the filing of the forty (40) copies of this Petition for Writ of Certiorari and all District Court Docket Entries, Transcripts and Pleadings appear at the appendix in the Appellant's brief in the 3rd Circuit Court of Appeals which such Appendix was also filed with the Court at the same time).

The Supreme Court's appellate jurisdiction in this matter rests upon 28 U.S.C.A. §1254 which reads in pertinent part:

§1254. Courts of Appeals; certiorari; appeal; certified questions

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATEMENT OF THE QUESTIONS PRESENTED

I. WAS THERE SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION OF THE DEFENDANT?

(Answered in the affirmative in the Court below.)

II. DID THE PROSECUTOR WRONGFULLY INSERT HIS OWN PERSONAL BELIEFS WHEN ADDRESSING THE JURY AS TO A CRITICAL FACT IN HIS ARGUMENT?

(Answered in the negative in the Court below.)

III. DID THE COURT'S INSTRUCTIONS TO THE JURY SERIOUSLY MIS-STATE THE ELEMENTS OF THE OFFENSES FOR WHICH THE DEFENDANT WAS CHARGED?

(Answered in the negative in the Court below.)

IV. DID THE USE AGAINST THE DEFENDANT OF HEARSAY EVIDENCE BASED UPON EXTRAJUDICIAL STATEMENTS OF HARRINGTON TO AN UNDERCOVER POLICE OFFICER ON THE FACTS AND CIRCUMSTANCES OF THIS CASE VIOLATE THE DEFENDANT'S RIGHT TO CONFRONT AND CROSS EXAMINE THE WITNESSES UNDER THE SIXTH AMENDMENT?

(Answered in the negative in the Court below.)

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS AT ISSUE IN THIS PROCEEDING

The criminal statutes which Petitioner Alfred Viner was alleged to have violated were two Sections of Tital 21 of the United States Code outlawing distribution of a controlled substance and conspiracy to effect such distribution respectively (21 U.S.C.A. §841(a)(1) and §846). Essentially the prime source of authority which Petitioner asserts in support of his claim of error in the Trial is the Sixth Amendment to the United States Constitution. More particularly the Sixth Amendment guarantee of the right to confront accusatory evidence has been abridged in Petitioner's case as a result of his conviction's being based substantially on evidence in the form of extrajudicial hearsay declara-

tions. The statements themselves were purported to have been made by the Petitioner in the presence of his co-defendant Albert Harrington who in turn related the contents of the remarks to Federal Agents of the Drug Enforcement Administration who ultimately testified as to this hearsay upon hearsay at the trial. The admission into evidence of those hearsay declarations alleged to have been made by the Petitioner under circumstances where the contents of the averments that the Jury was exposed to were not subject to contradiction or cross examination by counsel for the Petitioner abridged the Sixth Amendment confrontation guarantee. Similarly, all of the other assignments of error made before the 3rd Circuit

Court of Appeals on behalf of the Petitioner resulted from the same violation of this confrontation right. Specifically, the Jury's verdict of guilty on evidence insufficient to sustain a conviction was the result of evidence in the form of the hearsay declarations which the trial Court improperly refused to exclude. Again, the prosecutor's inflammatory remarks were in the form of a statement of his personal conclusion that the Petitioner was indeed conspiring allegedly with the co-defendant. The conclusion to which the prosecutor expressed his own personal conviction was the very same factual element of independent proof of the defendant's membership in the conspiracy which the Government failed to demonstrate and without which hearsay declarations

In addition to the Sixth Amendment there exists authority in the Federal Rules of Evidence to support the conclusion that the disputed hearsay declarations were admitted into evidence under circumstances not in compliance with the provisions of Rule 801(d)(2)(E). That Section of the Evidentiary Rules reads in pertinent part as follows:

> Rule 801, Definitions:
> (d) Statements which are not hearsay. A statement is not hearsay if...
> (2) Admission by party opponent...
> (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

Petitioner, Alfred Viner, seeks review of the Judgement Order dated January 11, 1978, in the Third Circuit Court of Appeals affirming the Judgement of Conviction and Sentence issued and entered May 19, 1977 by Honorable Joseph L. McGlynn, Jr. in the Eastern District of Pennsylvania subsequent to a conviction for certain federal narcotics offenses.

The Petitioner was initially arrested by complaint and warrant on October 29, 1976, issued by Honorable Richard Powers, United States Magistrate of the Eastern District of Pennsylvania. Thereafter followed preliminary hearing before Judge Scuderi at which probable cause was found and on November 24, 1976, a true bill was returned from the Grand Jury with two counts charging sale of a controlled substance and conspiracy to sell said substance.

After arraignment conducted on

December 2, 1976, at which the defendant pleaded not guilty to both counts in the indictment, the defense filed pre-trial motions on December 21, 1976.

The Government's answer to pre-trial motions was filed December 30, 1976, and the Court's Order denying the pre-trial motions of the defense was entered January 20, 1977. Trial before Honorable Joseph L. McGlynn, Jr. and a jury commenced on February 8, 1977, and the jury returned a verdict of guilty on February 11, 1977, as to both counts of the Indictment. Post-trial motions were timely filed and were all denied, after which judgment of conviction was entered and sentence imposed by Order of Judge McGlynn dated May 19, 1977.

Timely Notice of Appeal was filed in the Third Circuit Court of Appeals after which Judgment Order was entered dated January 11, 1978, and simply reciting the issues raised on Appeal by Petitioner

followed by the conclusion of the Court that the issues were unmeritorious and the Judgment of Conviction and Sentence would be affirmed without any further comment as to the merits of the legal or factual contentions raised in the Appeal Brief.

Crucial to understanding the factual background of the prosecution which resulted in the conviction for which review is sought is the distinction between the evidence admitted at trial to prove actual wrongful conduct by the Petitioner as opposed to that evidence which was admitted at trial in the form of extra-judicial hearsay and double hearsay statements perported to have originated with the Petitioner and been repeated by his co-defendant to federal agents who in turn testified as to contents of the declarations in question. In fact, the only admissible evidence introduced regarding

the Petitioner's conduct resulted from the testimony of four police officers who allegedly observed the Petitioner on July 24, 1976.

The central figure among the police officers is Officer Mitchell, who was working as an undercover agent.

On July 23, 1976, Mitchell contacted Albert Harrington to try to purchase two ounces of heroin from him (Tr. 2-16.) Mitchell met with Harrington the following day at Gimbel's parking lot in Cheltenham and gave Harrington a sum of money. (Tr. 2-17.) Mitchell did not search Harrington or his car. (Tr. 2-34.)

Three other officers corroborated a meeting between Harrington and Petitioner in Harrington's car at Korvette's parking lot. Officer Alvin Leon Williams saw Harrington drive into the lot (Tr. 25) and later saw Petitioner drive into the same lot. (Tr. 27.) He saw Petitioner

enter Harrington's car where he stayed with Harrington about ten minutes. (Tr. 28.) Williams observed Petitioner return to his own car and drive away. He followed Petitioner's car for about eight blocks and discontinued surveillance. (Tr. 28-29.)

Officer Stanley Michael De Van observed Harrington and Petitioner drive into Korvette's parking lot. (Tr. 43-44.) He saw Petitioner walk to and enter Harrington's car. He testified that Petitioner was carrying a small, reddish-pink box. (Tr. 44.) After a few minutes, he saw Petitioner leave Harrington's car and return tp his own vehicle. He did not see Petitioner carrying anything as he returned. (Tr. 44.)

Officer Herbert LaGuins observed Harrington and Petitioner drive their cars into Korvette's parking lot and saw Petitioner get into Harrington's car where they appeared to have a conversation. (Tr. 2-10.) After a few minutes, he saw

Petitioner leave Harrington's car, get into his own car and drive away. (Tr. 2-11.)

Subsequent events were described in further testimony of Officer Mitchell. Harrington drove his car past Mitchell and motioned to him to follow. (Tr. 2-19.) Harrington drove some 200 yards to another part of the same shopping center parking lot and parked in front of Woolworth's. (Tr. 2-56.) Mitchell testified that this took Harrington "a minute or so". (Tr.2-34, 2-57, 2-64.) Mitchell followed in his car. Harrington then handed Mitchell "a blue, a pink tissue box." (Tr. 2-19.) Mitchell described the box as a "new box of tissues". He tore the opening a little bit to get down into it and found a substance underneath the tissues that was later indentified as 49 grams of heroin. (Tr. 2-19, 2-44.) Mitchell then gave Harrington $200 and returned to his office. (Tr. 2-19, 2-20.)

When Mitchell left Harrington,

he did not search Harrington. (Tr. 2-35.) Officer De Van confirmed that Harrington was not then searched. (Tr. 58) De Van testified that he did not know if Harrington then had the money given to him by Mitchell to purchase the heroin. (Tr. 58-59.) Officer Mitchell testified that he did not enter Harrington's car but, looking in from the outside, he did not see any other tissue boxes inside the car. (Tr. 2-43.)

That is the entire evidence admissible to prove that the Petitioner knowingly and intentionally distributed 49 grams of heroin on July 24, 1976, if the hearsay of Harrington is excluded. That evidence utterly fails to meet the minimum level of proof necessary to sustain a conviction.

The only evidence which the four police officers testified to was in the form of the double hearsay statements

alleged to originate from the Petitioner and discussed supra. The policemen to whom Petitioner's alleged remarks were related secondhand by co-defendant Harrington were allowed to testify from the outset of the trial copiously as to the details of the hearsay declarations in question without there ever having been a determination by the trial court as to the existence of independent proof of the conspiracy's existence and the Petitioner's membership therein as a foundation for the admission of the declarations. The hearsay declarations which were testified to could be characterized accurately as extraordinarily prejudicial to the Petitioner and were generally detailed admissions alleged to have been made by the Petitioner to co-defendant Harrington with respect to their mutual goals and intentions regarding certain purposed narcotics transactions which they intended to consummate

with undercover federal agents.

ARGUMENT

I. THERE WAS NOT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION OF PETITIONER.

While Petitioner was indicted for a substantive offense, 21 U.S.C. §841(a)(1), and a conspiracy offense, 21 U.S.C. §846, there was insufficient evidence to support a conviction upon either count of the indictment. The substantive offense and the conspiracy offense are closely linked; as will be seen the latter is dependent upon the former. Both counts fail of sufficient proof.

The key to the issue of the sufficiency of the evidence in this record lies in the testimony of Officer Wallace Bobby Mitchell. Mitchell testified to many statements said to have been made to Mitchell by Albert Harrington. Harrington was not called as a witness in this case. Everything that

Mitchell testified to recounting statements by Harrington was hearsay. The statements of Harrington, as detailed by Mitchell were highly prejudicial to Petitioner. These hearsay statements involved certain actions attributed to Petitioner and statements said to have been made by Petitioner. Mitchell, the witness, had no first-hand knowledge of the actions or the statements. His testimony was based in its entirety on accounts he had received from Harrington. Mitchell's testimony reciting Harrington's extra-judicial statements tended to implicate Petitioner in selling a quantity of heroin to Harrington on July 24, 1976, and in participating in an abortive sale of additional quantities of heroin to Harrington on October 27, 1976. (Tr. 2-20, 2-21, 2-23, 2-24, 2-28.) All of this hearsay was received into evidence over the objection of the Petitioner. None of this testimony was properly admissible.

Without it, the evidence against Petitioner is entirely lacking in any basis for conviction.

The theory upon which the evidence was proffered is that Harrington was a co-conspirator of Petitioner. Count I of the indictment alleges a conspiracy between Petitioner and Harrington. The only admissible evidence to prove that conspiracy, however is the evidence put forward in an attempt to prove the substantive offense. The hearsay statements testified to by Mitchell are admissible only after a conspiracy has been proved to exist. The only way to prove the alleged conspiracy was to prove the substantive offense. Without the prejudicial hearsay statements, the record is not sufficient to support a conviction on the substantive count. Failure of proof on the substantive count leads to the conclusion that the conspiracy count is like-

wise unproved. And, when the proof fails to establish a conspiracy, the testimony concerning the co-conspirator's statements, even though provisionally received, must be excluded from the record.

The starting point is, therefore, the nature of the evidence available to prove the substantive offense charged. The Court apparently arrived at the same conclusion in structuring the charge to the jury. Even though the substantive offense appears in Court II of the indictment, the Court took this part of the indictment first. (Tr. 2-109.) Since the evidence intended to show a conspiracy is merely an extension of the evidence adduced on the substantive offense, this was a logical approach to the jury instructions.

(1) There was insufficient evidence to prove the substantive offense charged against Petitioner.

Except the hearsay evidence testified to by Officer Mitchell, the entire case against Petitioner on the substantive count rests upon the testimony of four police officers who observed Petitioner on July 24, 1976. The sum total of those observations does not make out any offense on the part of the Petitioner.

The central figure is Officer Mitchell, who was working as an undercover investigator. (Tr. 2-15.) On July 23, 1976, Mitchell contacted Albert Harrington to try to purchase two ounces of heroin from him (Tr. 2-16.) Mitchell met with Harrington the following day at Gimbel's parking lot in Cheltenham and gave Harrington a sum of money. (Tr. 2-17.) Mitchell did not search Harrington or his car. (Tr. 2-34.)

Three other officers corroborated a meeting between Harrington and Petitioner in Harrington's car at Korvette's

parking lot. Officer Alvin Leon Williams saw Harrington drive into the lot (Tr. 25) and later saw Petitioner drive into the same lot. (Tr. 27.) He saw Petitioner enter Harrington's car where he stayed with Harrington about ten minutes. (Tr. 28.) Williams observed Petitioner return to his own car and drive away. He followed Petitioner's car for about eight blocks and discontinued surveillance. (Tr. 28-29.)

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of tissues". He tore the opening a little bit to get down into it and found a substance underneath the tissues that was later identified as 49 grams of heroin. (Tr. 2-19, 2-44.) Mitchell then gave Harrington $200 and returned to his office. (Tr. 2-19, 2-20.)

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That is the entire evidence admissible to prove that the Petitioner knowingly and intentionally distributed

49 grams of heroin on July 24, 1976, if the earsay of Harrington is excluded. That evidence utterly fails to meet the minimum level of proof necessary to sustain a conviction.

The insufficiency of the proof in this case is demonstrated by the decision of the United States Court of Appeals for the Third Circuit in United States v. Pratt, 429 F.2d 690 (3d Cir. 1970). There are striking similarities to the record in this case. Moore, an undercover agent, made an engagement to meet a man named Wilson to buy heroin. When they met, Wilson informed Moore that they would have to go to another place. They drove to that neighborhood and parked. When they arrived, Wilson took the agent's money and walked down the street. Another officer, watching the whole transaction, followed Wilson and saw him meet and talk with the defendant, Pratt. Wilson and

Pratt both walked back to the car where the undercover agent "buyer" was sitting. Pratt looked in at the passenger. He and Wilson then walked away and had another conversation. Thereupon both Wilson and Pratt got into the car with Moore. Wilson sat in the front seat next to the agent; Pratt sat in back. Wilson, in Pratt's presence, handed two glassine bags of heroin to Moore.

The Court of Appeals held that this evidence was too weak to sustain a conviction of Pratt for selling heroin in violation of 26 U.S.C. §4704(a) and 4705(a), the provisions of which were the antecedents of the statutes relied on in this case.

> It appears that the court below had a number of possibilities to consider in determining whether a motion for judgment of acquittal should be granted. It is possible that Wilson lied when he said that he had to go to the Hill District to get narcotics and

> that he may have had them in his possession all the time. It is possible and the United States contends that it is probable that Pratt gave the two glassine packages of heroin to Wilson during the course of one of their conversations on the street. But there is no proof of this, if indeed, it be a fact. It would appear as if Pratt in his inspection of Moore in Moore's car, when he peered at Moore 'in' or through the windshield possibly was sizing up a prospective customer... Proof must be made by evidence. There is no proof whatsoever that Pratt ever had the two bags of heroin in his possession or that he sold or gave them to Moore in violation of the statutory charges. 429 F.2d 692-693.

Even though Wilson's only apparent source of supply remained with him when he delivered the heroin to the undercover agent, the Court of Appeals held the evidence insufficient as a matter of law.

An analogous decision was handed down by the United States Court of Appeals

for the Fifth Circuit, United States v. Tyler, 505 F.2d 1329 (5th Cir. 1975). Government agents had been observing and negotiating with Armand in an effort to discover the source of cocaine. An undercover agent, Gillis, arranged to buy two kilograms of cocaine. Gillis and Armand met at the latter's apartment, where Gillis was asked to give Armand $25,000, the agreed purchase price. Armand indicated that he would leave alone to obtain the cocaine and then return to deliver it. Gillis, however, asked to see a sample before parting with the $25,000. Armand agreed, but before leaving saw and counted Gillis' money. Armand left and drove to a garage apartment occupied by the defendant, Tyler. Other officers followed and observed his actions. Armand entered the defendant's apartment. After a few minutes, he left and drove around the neighborhood for a short while. He then

returned to defendant's apartment. Before entering the apartment for the second time, he spoke briefly to an individual whom some witnesses identified as the defendant. Shortly thereafter, Armand and Tyler came out of the apartment and drove in two separate vehicles to Armand's residence.

Armand joined undercover agent Gillis who was now in his automobile. Tyler parked some distance behind Armand's car, got out and stood waiting with a Chivas Regal liquor carton under his arm. Gillis testified that he asked Armand where the cocaine sample was; Armand replied that he had brought the entire quantity with him and that the source was also with him, gesturing in Tyler's direction. Gillis arrested Armand and other officers immediately arrested Tyler. The Chivas Regal liquor carton was seized from Tyler and it was found to contain 846 grams of cocaine.

Tyler was charged with a substantive offense under 21 U.S.C. §841(a) and with conspiracy under §846. Armand did not testify. Following conviction and sentence, Tyler urged reversible error in allowing Gillis to testify that Armand had identified Tyler as his cocaine source. The Court of Appeals agreed with the contention of the defendant.

> We determine that there was an insufficient independent showing that Tyler entered into a conspiracy to distribute cocaine to permit admission of Armand's statement under the co-conspirator exception to the hearsay rule... One of the essential elements of a conspiracy charge is an intent to agree to do a wrongful act, ... Here, the only independent proof of concerted action was testimony as to Armand's visits to Tyler's apartment in the hour immediately preceding their arrest. There was no evidence as to what transpired inside Tyler's apartment ... It may be that Tyler was, in fact, the source of the cocaine. However, it is equally possible that Tyler's esculpatory story is true. In either case, the

> jury should be asked to evaluate the credibility of Tyler's story in the absence of the damning comment of the alleged co-conspirator, or alternatively unless Armand is called to the stand and directly gives evidence of Tyler's participation. 505 F.2d at 1332.

In Tyler and in Pratt, the defendant was arrested at the scene of the sales transaction to the undercover police agent. In Tyler, the defendant was holding a large supply of narcotics when arrested. Nonetheless, the Court of Appeals for the Fifth Circuit concluded that, as a matter of law, there was insufficient evidence of both the substantive offense and the conspiracy offense.

The prosecutors in Pratt and Tyler had stronger cases against those defendants than the Government produced against the Petitioner in the instant prosecution. The source of the heroin

found in the box delivered by Harrington to Mitchell is wholly conjectural. It is admitted by the Government that Harrington was not searched before meeting Petitioner. The police officers testified that they knew Harrington had a source of heroin other than Petitioner. (Tr. 2-40.) It is further admitted by the Government that Harrington was not searched after the meeting with Petitioner. There is, therefore, no proof that Harrington delivered any money to Petitioner on July 24. All that is known is that Petitioner was seen carrying a box that looked like the box Harrington later delivered to Mitchell with heroin inside. The entirety of the evidence against Petitioner is thinner than a tissue.

To convict Petitioner of committing a substantive offense on July 24, there must be proof beyond a reasonable doubt that he delivered heroin to

Harrington. At most, the evidence raises a suspicion, but "suspicion falls short of proof beyond a reasonable doubt." United States v. Heithaus, 391 F.2d 810, 811 (3d Cir. 1968). A conviction that requires surmise cannot be permitted in a criminal case. The record, therefore, does not contain the basis for a conviction of Petitioner on the substantive count, cf. United States v. Heckman (3d Cir. 1973) 479 F2d 726, United States v. Kline (3d Cir. 1975) 515 F.2d 751 and United States v. Kenny (3d Cir. 1972) 642 F.2d 1205.

(2) The insufficiency of evidence to prove the substantive offense charged is not cured by resort to the theory of aiding and abetting.

The weakness in the prosecution's case against petitioner is not cured by resort to the theory that the petitioner might have been an accomplice, aiding and abetting a principal to commit the substantive offense. Although the Court included such a charge in the instructions to the jury, it is unavailing to overcome the patent lack of probative evidence of petitioner implication in any crime.

If there were any validity to such an accomplice theory, it would rest upon the notion that Harrington was a principal who distributed a controlled substance to the undercover police officer, Mitchell; and that petitioner was somehow implicated as an aider and

abettor of Harrington in this offense. The mere statement of the theory, in light of the facts of this record, demonstrates its inapplicability as a basis for convicting petitioner.

The only proven action of petitioner that even arouses suspicion is his meeting with Harrington at Korvette's parking lot. Either petitioner did deliver narcotics to Harrington, or he did not. There is no other basis for connection petitioner to Harrington's subsequent delivery of heroin to Mitchell. Petitioner was not in the vicinity when the narcotics were delivered to the undercover police officer. In the analogous case against Pratt, the alleged source of the heroin Wilson delivered to Moore, there was a contention that Pratt was an accomplice to the crime committed by Moore. The Court of Appeals for the

Third Circuit firmly rejected such a contention, even though Pratt was sitting in the car when Moore delivered the two bags of heroin to Moore. United States v. Pratt, supra, at 693. The court declared that to hold Pratt as an aider and abettor would be to deprive him of his liberty without due process of law; to find him guilty by association. As the Court of Appeals said in a contemporaneous case, "mere presence at the scene of a crime, even in the company of one or more principal wrongdoers, does not alone make one an aider or abettor". United States v. Barber, 429 F.2d 1394 (3d Cir. 1970). See also United States v. Cades, 495 F.2d 1170 (3d Cir. 1974).

In the instant case, petitioner was not even present when the subsequent exchange between Harrington and Mitchell occurred. He had driven out of the

parking lot, with Officer Williams following for some eight blocks. There is no basis whatsoever to implicate petitioner in any way with the offense allegedly committed by Harrington, unless petitioner can be proved to have committed the independent offense of having distributed heroin to Harrington. As has been shown at length before, there is no sufficient evidence to make such proof.

(3) There was insufficient evi- to prove the conspiracy offense charged against Petitioner.

There was not sufficient evidence to prove that Petitioner conspired with Harrington to distribute unlawfully a controlled substance. Again it must be reiterated that the hearsay evidence adduced in the testimony of Officer Mitchell cannot be used to prove the existence of a conspiracy. Under the teaching of Glasser v. United States, 315 U.S. 60, 74-75 (1942), the prosecution must establish by substantial evidence restricted to proof aliunde co-conspirator's hearsay statements, the fact a conspiracy existed. The Court of Appeals for the Third Circuit has declared that "in assessing the evidence of the existence of a conspiracy and each defendant's connection with it, hearsay statements of other alleged co-conspirators...must be excluded from consideration."

United States v. DeCavalcante, 440 F.2d 1264, 1273 (3rd Cir. 1971).

Without the hearsay evidence adduced through the testimony of Mitchell, the prosecution failed to make our any case of conspiracy between Harrington and Petitioner. All of the events provable by admissible evidence and relevant to the incident on July 24, 1976, have been evaluated in connection with the analysis of the substantive charge against Petitioner. Those events, which do not show a basis for more than mere suspicion as to a substantive offense, likewise do not lay any foundation for a conviction of conspiracy. United States v. Cades, supra, at 1170.

The case for the Government is not strengthened by adding the events of October 27, 1976, again without the gloss of the inadmissible hearsay evidence. Officer Mitchell and Harrington had met at the latter's home, where Mitchell observed

Harrington put a sum of money into his pocket for the purpose, according to Harrington, of buying narcotics. (Tr. 2-77.) Harrington and Mitchell drove to the Stenton Diner in Mitchell's car. (Tr. 2-27.) Harrington entered the diner; shortly thereafter he came out and went to his own car which his wife had driven to the diner. (Tr. 2-29.) Harrington then returned to Mitchell's car, where Mitchell gave him $4,000 for for the purchase of heroin. (Tr. 2-29.) Harrington told Mitchell that the drugs had not arrived yet. (Tr. 2-37, 2-38.) Harrington re-entered the diner, came out again, and went back to his own car. (Tr. 2-29.) Petitioner appeared, coming out of the diner. He stopped briefly at his car, occupied by two women and a man, and then joined Harrington and his wife in their car. (Tr. 2-30.) While Petitioner was sitting in the back seat of the Harringtons' car, another patron emerged

from the diner, entered a car, and then drove out of the parking lot. (Tr. 2-31.) Officers staked out at the area promptly moved in and arrested Petitioner and Harrington. A search of Harrington disclosed that he still had possession of the money he had brought from his home. (Tr. 2-23, 2-33.) A search of Petitioner showed that he had in his coat pocket the $4,000, as marked by Mitchell, which Mitchell had given to Harrington a few minutes earlier. (Tr. 2-31.) On the floor of Harrington's car, in the back seat where the Petitioner had been sitting, an additional sum of money, approximately $3,500, was observed. (Tr. 2-31.) No drugs relevant to this case were found on Petitioner, on Harrington, or anyone else. (Tr. 2-36, 2-42.)

The Government made no charge that the events of October 27, 1976, constituted a substantive offense. They were cited only in the conspiracy count of

the indictment as some of the overt acts of the alleged conspiracy. Manifestly, the events outside the Stenton Diner do not imply wrongdoing of any kind. They show that Harrington transferred a sum of money to Petitioner, but the purpose of that payment is wholly ambigous. Mitchell's purpose in giving money to Harrington may or may not have been relevant to Harrington's payment to Petitioner. Nothing occurred to which Mitchell or other officers could testify from first-hand knowledge that implicated Petitioner in any narcotic distribution. No heroin was found by the arresting officers. Whatever the understanding between Mitchell and Harrington, there is absolutely no evidence to connect Petitioner with a plan to distribute narcotics.

The inadmissible hearsay evidence is essential for the prosecution to establish any potential wrongdoing involving

Petitioner. That step cannot be taken. As the Supreme Court said, there is always the danger in conspiracy cases that provisionally admitted evidence will itself be used to support the prima facie case. If this were allowed by courts, "hearsay would lift itself by its own bootstraps to the level of competent evidence." Glasser v. United States, supra, at 75. Without the bootstrap use of the hearsay attributed to Harrington in Mitchell's testimony, there is manifestly no prima facie case to support a conviction of Petitioner on the conspiracy count.

It follows, of course, that the hearsay evidence never becomes admissible in the case against Petitioner. The prosecution cannot rely upon Harrington's statements to prove the conspiracy count. Nor can the prosecution use such hearsay to establish Petitioner's complicity of

a substantive charge. Therefore, Petitioner's motion for judgment of acquittal must be granted or a new trial ordered.

II. THE PROSECUTOR WRONGFULLY INSERTED HIS OWN PERSONAL BELIEF ON A CRITICAL FACT IN HIS ARGUMENT TO THE JURY.

There is today widely expressed concern for the proper conduct of counsel for the prosecution and counsel for the defense in criminal cases. Unfortunately, some prosecutors have permitted an excess zeal for conviction or a fancy for exaggerated rhetoric to carry them beyond the permissible limits of argument. Berger v. United States, 295 U.S. 78 (1935); United States v. Latimer, 511 F.2d 498 (10th Cir. 1975); United States v. Ludwig, 508 F.2d 140 (10th Cir. 1974); United States v. Peak, 498 F.2d 1337 (6th Cir. 1974); United States v. Goodwin, 492 F.2d 1141 (5th Cir. 1974); United States v. Newman, 490 F.2d 139 (3d Cir. 1974).

Section 5.8 of the American Bar Association Standards Relating to the Prosecution Function and to the Defense

Function (1971), provides guidance on the limits of permissible argument:

> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor to mis-state the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence of guilt of the defendant.

The United States Court of Appeals for the First Circuit trenchantly underscored the Standards: "...the lesson to the prosecutor should be obvious: 'I believe' is a dirty verb." United States v. Tropaeno, 476 F.2d 586, 588 (1st Cir. 1973).

As discussed in the first part of this Petition, the critical fact in this case, on which the record is totally silent, is whether Petitioner delivered heroin to Harrington on July 24. In his

peroration, the prosecutor overstepped the bounds by asserting that "it is very obvious that there was heroin in here..." (Tr. 2-99.) Defense counsel immediately interrupted, protesting that the prosecutor cannot argue what the Government thinks. The prosecutor continued: "As an advocate, and I am not invading the province of the jury, believe me, it's up to you, but we think ..." (Tr. 2-99.) Defense counsel again objected, and the court prompted the prosecutor to correct his rhetoric to limit argument to what the evidence shows. (Tr. 2-100.)

Notwithstanding the interventions of defense counsel and the assistance of the Court in bringing the prosecutor back to acceptable argument, the damage was done. The jury was aware that the Government prosecutors had a personal belief that there was heroin delivered by Petitioner to Harrington.

The Court, no doubt inadvertently, underscored the error by instructing the jury to consider the evidence in light of the various reasons and arguments that each lawyer has presented. (Tr. 2-107.)

Defense counsel's motion for mistrial (Tr. 2-99, 2-100) should have been granted.

III. THE COURT'S INSTRUCTONS TO THE JURY SERIOUSLY MISSTATED THE ELEMENTS OF THE OFFENSES OF WHICH PETITIONER WAS CHARGED.

The Court's definition of the substantive offense in this case was fatally defective. In instructing the jury on the elements of the offense, the Court did not ever read the relevant statute verbatim. Rather the Court paraphrased the statute. (Tr. 2-109.) After two extremely short references to the "certain elements which the Government must prove to you beyond a reasonable

doubt" (Tr. 2-110), the Court in effect instructed the jury that it could convict Petitioner without proof of any of the elements of the offense.

The Court's very brief account of the substantive crime was followed by this instruction on accomplice liability:

> "In the case where two or more persons are charged with commission of a crime the guilt of one of the defendants may be established without proof that he did every act constituting the offense charged because there is another statute of the United States which says whoever aids or abets, counsels, commands or procures the commission of an offense is punishable as a principal." (Tr. 2-110)

The Court compounded the error by attempting to apply the theory of accomplice liability to this Petitioner:

> "So even though there may not have been a distribution by Mr. Viner, if you find that he aided and abetted or counseled or procured the commission of the offense by someone else, then, of course, he could be indicted and

> tried and found guilty as a principal." (Tr. 2-110, 2-111.)

It is respectfully submitted that this instruction was plain error. The Court allowed the jury to convict Petitioner as an accomplice of someone else "even though there may not have been a distribution by Mr. Viner." The only "someone else" that could be referred to was Harrington, indicted as a co-defendant but not on trial. Harrington's substantive offense of distributing a controlled substance occurred, if at all, in the delivery of heroin to Officer Mitchell. Petitioner Viner did not participate in any way in that exchange. He had long since left the parking lot. The only way to connect Viner to the substantive offense of Harrington is through prior delivery of that heroin by Viner to Harrington. That, if proven, would have established the substantive crime with Viner as a principal.

The Court, without any basis in the

in the evidence, allowed the jury to convict Petitioner on a spectulative theory of accomplice liability which, the Court charged, did not necessarily involve the Petitioner in the substantive offense as principal. The Court told the jury that it need not find that the Petitioner did <u>every</u> act constituting the substantive offense. The Court, in effect, told the jury that they could return a verdict of guilty even though Petitioner did <u>none</u> of the acts constituting the substantive offense. Where the only conceivable basis for conviction of a defendant is through acts that either would constitute the substantive offense or would be non-criminal, it is plain error to instruct the jury that it can convict the defendant on the basis of accomplice liability.

It is understandable that the Court's mind would not rest with the substantive definitiion of the crime charged in this case.

The admissible evidence, as outlined earlier in this Memorandum, is so lacking in probative weight that alternative theories become a necessity if a conviction is to be obtained. However, in this case, there is no alternative. Either Petitioner was guilty of distribution, or he was innocent of criminal liability. The jury charge that slipped off the elements of the substantive crime to accomplice liability was seriously prejudicial to the Petitioner.

The flaw that vitiates conviction of the substantive offense likewise infects conviction of the conspiracy count. Just as there is no evidence of aiding or abetting apart from the possible commission of a substantive offense, there is no evidence of conspiratorial agreement independent of the same acts.

Further, the instructions to the jury never clearly instructed the jury on the impermissible use of hearsay to prove

existence of a conspiracy and Petitioner's connection therewith. The Court did not insturct aht the existence of a conspiracy must be proved by evidence aliunda hearsy evidence attributed to a non-testifying alleged co-conspirator. The Court only referred to such evidence as inadmissible to show whether the Petitioner was a part or a member to the conspiracy. (Tr. 2-115, 2-117.)

Even on the subordinate question of Appellant's connection with the conspiracy, the Court's instructions were grossly misleading. The Court declared that the jury must base its determinations on "evidence of Mr. Viner's own conduct." (Tr. 2-116.) But the Court never made sufficiently clear that evidence as to Mr. Viner's own conduct that appeared in hearsay evidence could not be relied upon. The record in this case is saturated with hearsay that purports to describe statements and acts of the Petitioner.

None of this extremely prejudicial evidence could properly be employed by the jury in determining, first, whether a conspiracy existed and, second, if a conspiracy existed, whether Petitioner was a party to such conspiracy. The Court's instructions never made that point understandable to the jury. Consequently, there is a fatal defect and plain error that plainly and substantially vitiates conviction of Petitioner. See the aiding and abetting instruction in accord with United States v. James (5th Cir. 1975) 510 F2d 546.

IV. USE AGAINST THE PETITIONER OF HEARSAY EVIDENCE BASED UPON EXTRA-JUDICIAL STATEMENTS OF HARRINGTON TO AN UNDERCOVER POLICE OFFICER ON THE FACTS AND CIRCUMSTANCES OF THIS CASE, VIOLATED PETITIONER'S RIGHT TO CONFRONT AND CROSSEXAMINE WITNESSES UNDER THE SIXTH AMENDMENT.

The only seriously prejudicial evidence introduced in this case against Petitioner emanated from a person who never appeared as a witness and who was never subject to cross-examination. The witness Mitchell, an undercover police officer, testified to numerous statements by Albert Harrington. Some of this hearsay described conduct attributed to Petitioner; most described statements said to have been made to Harrington by Petitioner. This extremely prejudicial evidence came into Petitioner's trial to prove the truth of the content of Harrington's statements to Mitchell.

Not only was Mitchell's testimony hearsay. To a very substantial extent, it constituted hearsay placed upon hearsay.

None of the principles that underlie the rule admitting into evidence the statements of co-conspirators during the course of a conspiracy and in furtherance of the purpose of the conspiracy justify application of an exception to the hearsay rule in this case. See Federal Rule of Evidence 801(d)(2)(E). The exception derives from the principle of agency. In a collective enterprise engaged in pursuit of a wrongful purpose, there is validity in holding each party to the illicit agreement responsible for the acts of other parties in furtherance of the common venture. Such a rationale for representative admissions loses all meaning in the circumstances of a case like this, which at most involves a chain of separate sales of narcotics.

Application of the concept of conspiracy to such circumstances can be pernicious in many ways. Not the least is

that it permits the Government to have the testimony of a person like Harrington without ever putting him on the witness stand and subjecting him to cross-examination. By using Mitchell as the conduit of Harrington's words, the Government deprived the Petitioner of all opportunity to impeach the source of highly damaging evidence.

Petitioner was deprived of the opportunity to confront his accuser and to cross-examine the chief witness against him. This violated the Constitution of the United States.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 77-1738

UNITED STATES OF AMERICA

v.

VINER, ALFRED, a/k/a SONNY,
APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D.C. Crim. No. 76-554-2

Argued January 4, 1978

Before ROSENN and HIGGINBOTHAM, Circuit Judges, and BARLOW, District Judge*

JUDGEMENT ORDER

Defendant was indicted for distributing heroin and conspiracy to distribute heroin in violation of 21 U.S.C. §841(a)(1)

and 21 U.S.C. §846. He was convicted before a jury of both counts. On appeal defendant raising the following issues:

(1) There was insufficient evidence to sustain a conviction under either count.

(2) The prosecutor wrongfully inserted his own personal beliefs in addressing the jury, to the prejudice of the defendant.

(3) The court's instructions to the jury were erroneous.

(4) The use against defendant of hearsay evidence was not proper because of insufficient independent evidence of the conspiracy.

After consideration of all contentions raised by the defendant, it is

ADJUDGED and ORDERED that the judgement of the district court be and is hereby affirmed.

BY THE COURT:

_____
Circuit Judge

Attest:

_____
Thomas F. Quinn, Clerk

DATED: January 11, 1978

Certified as a true copy and issued in lieu of a formal mandate on February 2, 1978.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals for the Third Circuit

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*George H. Barlow, United States District Judge for the District of New Jersey, sitting by designation.

CERTIFICATE OF SERVICE OF THE PETITION FOR CERTIORARI PURSUANT TO RULE 33 OF THE RULES OF THE UNITED STATES SUPREME COURT

ROBERT F. SIMONE, Esquire and JAMES T. VERNILE, Esquire, being duly sworn according to law, depose and say that they are counsel for the Petitioner, as well as members of the Bar of the United States Supreme Court, and that copies of said Petition for Certiorari were served by depositing them in the United States mail, with first class postage, addressed as follows:

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DATE: 3/13/76

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